IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Discover Bank, c/o Discover Financial Services, Inc.,	:	
Plaintiff,	:	Civil Action No. C2-3-686
v.	:	Judge Gregory L. Frost
New Vision Financial, LLC,	:	Magistrate Judge Mark R. Abel
Defendant.	:	(ORAL ARGUMENT REQUESTED)

NEW VISION FINANCIAL, LLC'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS PLAINTIFF'S COMPLAINT FOR LACK OF PERSONAL JURISDICTION AND/OR IMPROPER VENUE OR IN THE ALTERNATIVE MOTION FOR TRANSFER OF VENUE TO THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF GEORGIA

I. PRELIMINARY STATEMENT

Personal jurisdiction over New Vision is not appropriate under the Ohio Long Arm statute. Discover relies upon the actions of New Vision's purported agent, Enhanced Asset Management ("EAM") as the basis for asserting personal jurisdiction over New Vision. The facts and law do not support Discover's arguments and instead clearly expose Discover's failure to meet its burden or proof based upon EAM's purported contacts with Ohio.

Discover's contention that personal jurisdiction complies with notions of fair play and substantial justice encompassed in the Due Process Clause of the Fourteenth Amendment to the United States Constitution is particularly misplaced. Discover has not and cannot cite to any case law, nor should it be inferred, that the due process requirements of the United States Constitution can be met through the actions of a third party. Therefore, the motion to dismiss should be granted.

Even assuming that this Court may assert personal jurisdiction over New Vision, the weight of authority and facts require the transfer of this case to the Northern District of Georgia. The venue rules were specifically designed to prevent plaintiffs from picking a forum that it knows is inconvenient to the defendant. The facts must be examined in a light most favorable to the party who **did not** choose the forum. The interests of justice favor the transfer of this case to the Northern District of Georgia.

II. ADDITIONAL STATEMENTS OF FACTS RAISED DUE TO DISCOVER'S OPPOSITION MEMORANDUM

The original Agreement between New Vision and Discover went into effect on January 5, 2001. At that time, all the accounts purchased by New Vision were being transferred to EAM for collection efforts. EAM accepted the accounts directly from Discover solely to avoid the costs and annoyance of transferring the accounts twice -- one from Discover to New Vision and a second from New Vision to EAM. *Affidavit of Mark Thompson ¶9, attached hereto.* The suggestion that the actions of EAM can be imputed to New Vision as the basis for jurisdiction is unfair and not supported by the case law cited by Discover.

Discover focuses its opposition memorandum argument upon the premise that New Vision is subject to personal jurisdiction because EAM had a Cincinnati, Ohio address and was authorized to act on New Vision's behalf in negotiating the original Agreement between Discover and New Vision. Such an argument requires an understanding of the relationship between New Vision and EAM and a timeline of events surrounding the dispute. As detailed in New Vision's motion to dismiss, it purchases charged off credit card debts from issuers, such as Discover, and transfers those accounts to third party collection agencies for collection. This is a dispute between a Georgia Corporation and a Delaware corporation arising out of an Agreement with no choice of law provision. Additionally, EAM is not based in Ohio, has no employees in

Ohio, and does not maintain an office in Ohio. *Thompson Aff. at ¶¶10-14.* Its only operations are located in Jacksonville, Florida. *Id.* at ¶¶*10-11.* EAM was only situated in Ohio for a few months and since January 1, 2001, has not performed any business functions on behalf of New Vision from the state of Ohio. *Id.*

A separate company, Enhanced Recovery Corporation ("ERC") maintains an office in Cincinnati, Ohio. However as detailed below, under Sixth Circuit law, the actions of ERC cannot be imputed to EAM or New Vision, nor can the actions of EAM cannot be imputed to New Vision for purposes of establishing personal diversity jurisdiction.

III. DISCOVER HAS NOT MET ITS BURDEN OF SHOWING THAT THE ASSERTION OF PERSONAL JURISDICTION OVER NEW VISION COMPORTS WITH NOTIONS OF SUBSTANTIAL JUSTICE

A. EAM's Purported Connections to Ohio Cannot Be Used by this Court as the Means to Assert Personal Jurisdiction over New Vision

Discover focuses upon the actions of EAM in arguing that the assertion of personal jurisdiction complies with the due process clause to the Fourteenth Amendment. Discover has not cited one case nor provided one fact to suggest that New Vision is subject to the jurisdiction of this court based upon its own conduct. And, indirect contact with Ohio through a third party is not adequate for the trial court to assert jurisdiction. *General Acquisition, Inc. v. GenCorp Inc*., 766 F. Supp. 1460, 1487 (S.D.Ohio, 1991) (holding that Ohio could not assert jurisdiction over a Delaware company that offered to provide funding to transaction involving Ohio company). In *General Acquisition*, the defendant in a securities action filed counterclaims against two related entities: Shearson Lehman Hutton, Inc. ("Shearson") and Shearson Lehman Brothers Holdings, Inc. ("SLB"). SLB filed a motion to dismiss that the Court did not have personal jurisdiction over it. The Court refused to assert personal jurisdiction over SLB based upon the actions of Shearson. *Id.* In refusing to assert jurisdiction over SLB, the Court refused

to impute the acts of one corporation to another related corporation's under the "transacting business" subsection of Ohio's long-arm statute. *Id.* The Court disregarded Shearson's contacts with Ohio in determining whether personal jurisdiction could be asserted over SLB. *Id.* Because SLB was (i) not registered or qualified to do business in Ohio; (ii) had not paid any state or local taxes; and (iii) did not have any offices, employees, bank accounts or telephone listings in Ohio, jurisdiction was not appropriate. *Id.*

Federal courts have long recognized that the actions of one company cannot be imputed to an affiliated company to establish personal jurisdiction over the second company. *See*, *e.g.*, *Cannon Manufacturing Company v. Cudahy,* 267 U.S. 333 (1925) (Foreign corporation, employing subsidiary corporation as means of doing business within state, is not "doing business" within state, so as to be subject to jurisdiction there.) The "minimum contacts test" of *International Shoe v. Washington,* 326 U.S. 310, 66 S. Ct. 154, 90 L.Ed. 95 (1945), changed the analysis from a mechanical application of facts and circumstances to a determination of reasonableness or fairness. *In re Telectronics Pacing Systems, Inc.*, 953 F.Supp. 909, 916-917 (S.D.Ohio 1997). Yet, courts continue to apply the principles of *Cannon* and have repeatedly refused to attribute the activities of one corporation to an affiliated corporation for the purpose of establishing the requisite minimum contacts for jurisdiction under *International Shoe* as long as the corporation has followed the requirements mandated by state law. See, e.g., *Schwartz v. Electronic Data Sys., Inc.*, 913 F.2d 279, 283 (6th Cir. 1990) ("When formal separation is maintained between a corporate parent and its corporate subsidiary, federal court jurisdiction over the subsidiary is determined by that corporation's citizenship, not the citizenship of the parent."); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983) (Finding that subsidiary was not alter-ego of parent); *Savin Corp. v. Heritage Copy Prods., Inc.*, 661 F.Supp.

463, 467 (M.D. Pa. 1987) ("[U]nder Pennsylvania law *Cannon* is still valid despite the developments of the minimum contacts analysis"); *Allen v. Toshiba Corp.*, 599 F.Supp. 381, 390-91 (D.N.M. 1984) (Citing *Cannon* and applying New Mexico corporate law to determine whether parent was alter-ego of subsidiary and thus subject to New Mexico jurisdiction); *Gutierrez v. Raymond Int'l, Inc.,* 484 F.Supp. 241, 253 (S.D. Tex. 1979) (Refusing jurisdiction over wholly owned subsidiary with common officers with parent on basis that alter-ego test was not met).

B. Because Discover Has Not Provided Any Evidence of New Vision's Actual Contacts with Ohio, the Motion to Dismiss Must be Granted

Recent Sixth Circuit decisions confirm that Federal Courts may not utilize the contacts of one corporation to assert personal jurisdiction over an affiliated, yet distinct and unique corporation. In *PTG Logistics, LLC v. Bickel's Snack Foods, Inc.*, 196 F.Supp.2d 593 (S.D. Ohio 2002), the Sixth Circuit clearly set forth that the acts of one corporation cannot be used to impute jurisdiction over another. The Appellate Court explained that as long as the formal separation of a parent and subsidiary is maintained, the two corporations must be regarded as separate for the purpose of federal court jurisdiction. Therefore, for the purposes of jurisdiction, the two defendants must be regarded as separate entities, and the plaintiff must establish a prima facie case for jurisdiction over each defendant." *Id. at 602.*

The justification for this Court refusing to assert personal jurisdiction over New Vision is stronger here than in the cases listed above. New Vision and EAM are not related. EAM is not a subsidiary of New Vision or vice versa. In *PTG Logistics*, the Sixth Circuit refused to impute acts of a wholly owned subsidiary to its parent. It would be even more tenuous to hale an unaffiliated company into Ohio based upon the conduct of its purported agent. Discover cites no authority or facts to support its contention that New Vision has the necessary contacts with Ohio,

but relies solely upon the activities of EAM.

Moreover, as detailed in the attached affidavit of Mr. Thompson, EAM's contacts with Ohio, if they may even be called "contacts," were insignificant. EAM has not had an office in Ohio since January 2001 and even then only operated in Ohio for a short period of time. Its office is located in Jacksonville, Florida. There are no facts alleged connecting New Vision to Ohio.

Under relevant case law, the Court cannot look to the actions of EAM to assert jurisdiction over New Vision. It must look at New Vision's own contacts, if any, to establish the requisite minimum contacts. Discover has failed to allege that New Vision itself has any actual contacts with Ohio. As such, it failed to meet that burden and the motion to dismiss must be granted.

IV. THE WEIGHT OF AUTHORITY OVERWHELMINGLY SUPPORTS THE TRANSFER OF THIS CASE TO THE NORTHERN DISTRICT OF GEORGIA

A. Discover Filed its Purported Claims Against New Vision in the Wrong District Court

Discover filed this suit in the wrong district court. 28 U.S.C. §1391 and the case law interpreting it are clear. A civil action wherein jurisdiction is founded only on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) ***a judicial district where any defendant resides, if all defendants reside in the same State***, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant is subject to personal jurisdiction at the time the action is commenced, if there is no district in which the action may otherwise be brought. (Emphasis added). The only

defendant in this lawsuit resides in Georgia. Its only office is in Georgia. There is no other jurisdiction where New Vision can be alleged to reside.

Discover does not even attempt to argue that New Vision resides in Ohio and completely ignores the clear language of the venue statute. It instead focuses upon the situations where a case purportedly should be transferred. Several factors enter into a court's consideration of a request for change of venue: (1) the convenience of the parties; (2) the convenience of the witnesses; (3) the interests of justice; and (4) whether the action could have been brought in the proposed transferee district. The court has broad discretion in deciding such motions, and the party requesting transfer has the burden of showing that transfer is desirable. The convenience associated with transfer must be sufficient to overcome deference to the plaintiff's choice of venue. However, where a suit is commenced in a state whose only connection to the case is that the defendant purportedly had a representative there, the plaintiff's chosen forum has no overriding importance. *See* 26 Fed. Proc., L. Ed. § 60:995; see also *Aeroquip Corp. v. Deutsch Co.,* 887 F.Supp. 293, at 294-295 (S.D.Ga. 1995) (Venue transfer granted to defendant company whose home was out of state, even with purported sales representative in state.)

B. <u>The Interests of Justice Strongly Favor Transfer of this Case to the Northern District of Georgia</u>

Discover argues that the case should be heard in Ohio because it is more convenient to Discover for the case to be heard there. Discover claims that its witnesses and documents are located in Ohio. New Vision has affirmed that all of its witnesses and documents are located in either Atlanta, Georgia or Jacksonville, Florida.[1] Neither Discover nor New Vision will admit

[1] Discover's conclusory argument that New Vision's only "key witness" is Fred Howard should be summarily rejected. New Vision will present numerous witnesses regarding its relationship with Discover. While those witnesses are not specifically identified in Mr. Howard's affidavit, this Court should not buy into Discover's attempt to caste Mr. Howard as New Vision's only witness. None of the witnesses who will testify on behalf of New Vision reside in the Southern District of Ohio.

that the other chosen venue is more convenient to it. Because both parties claim inconvenience, the Court must look at other factors in deciding which venue is most appropriate. As detailed below, the interests of justice strongly favor transfer to the Northern District of Georgia.

Discover cannot avoid the scope and breadth of its business operations. Discover is a national banking organization licensed in all 50 states. It is a multi-billion dollar company and a wholly owned subsidiary of one of the largest brokerage houses in the world. It has multiple offices around the United States and offers credit cards to citizens of all 50 states.

New Vision is not as large or sophisticated as Discover. It has six employees in its one Georgia office. It will not affect Discover's business, clients or profits if it is required to send several of its employees to Georgia for trial. New Vision, on the other hand, will be completely shut down if it is required to send its employees to Ohio for court appearances and trial. The interests of justice favor allowing both New Vision and Discover to operate their business without unnecessary obstructions. The only way to achieve such a goal is to transfer the case to the Northern District of Georgia.

C. Contrary to Discover's Misstatement of the Law, the Party that Did Not Select Jurisdiction is Granted Greater Weight When Evaluating the Convenience of the Parties

Discover misstated and misapplied the relevant case law and legal doctrine this Court must apply in determining whether to transfer venue. For example, Discover states in its opposition memorandum that:

> "New Vision incorrectly asserts that in 'assessing convenience of the litigants and parties, the Court should look at the facts in a light more favorable to the party who has not chosen the forum,' citing *Leroy v. Great W. United Corp.*, 443 U.S. 173, 99 S. Ct. 2710 (1979). In fact the case says nothing whatsoever to this effect."

Discover Bank Opposition Memorandum at p. 18, footnote 7.

Discover either seeks to mislead the Court or badly misreads *Leroy* and subsequent case law interpreting the decision. The United States Supreme Court clearly enunciated in that case that the convenience of the defendant, i.e. the party that did not select jurisdiction, is granted greater weight when evaluating the convenience of the parties to a lawsuit. *Id. at 2717.* That decision also clearly explained that the choice of venue cannot be given solely to the plaintiff. The convenience of the litigants and witnesses must be addressed, regardless of the jurisdiction in which the plaintiff chose to file its lawsuit. *Id. at 2718.* The general proposition that the Court must look to the convenience of the party who has not chosen the forum is succinctly restated and explained by Wright & Miller at 15 Fed. Prac. & Proc. Juris. 2d §3801. "The key to venue is that it is primarily a matter of choosing a convenient forum." It looks to the "convenience of the litigants and witnesses," although it is more concerned with the litigant who has not chosen the forum than with the litigant who has. "In most instances, the purpose of statutorily specified venue is to protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." (Emphasis added.)

IV. CONCLUSION

This Court may not, under relevant case law and the United States Constitution assert personal jurisdiction over New Vision Financial, LLC. Discover Bank has failed to meet its burden of establishing the requisite minimum contacts and the case should be dismissed.

In the alternative, pursuant to clear Federal law and the interests of justice, this case should be transferred to the Northern District of Georgia. Requiring Discover Bank, a multi-billion dollar company to send several of its employees to Georgia, creates far less inconvenience than requiring New Vision Financial, LLC to relocate one-half to two-thirds of its current work force during discovery and/or court proceedings.

Respectfully submitted,

s/Rodney A. Holaday
Rodney A. Holaday (0068018)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, OH 43215
Telephone: (614) 464-6400
Facsimile: (614) 464-6350
E-mail: raholaday@vssp.com

Attorneys for Defendant,
New Vision Financial, LLC

Of Counsel:

E. Scott Dosek, Esq.
Kutak Rock LLP
8601 North Scottsdale Road
Suite 300
Scottsdale, AZ 85253
Telephone: (480) 429-5000
Facsimile: (480) 429-5001
E-Mail: e.scott.dosek@kutakrock.com

Gregory R. Crochet, Esq.
Kutak Rock LLP
Suite 2100 Peachtree Center South Tower
225 Peachtree Street NE
Atlanta, GA 30303
Telephone: (404)222-4600
Facsimile: (404) 2224654
E-mail: gregory.crochet@kutakrock.com

CERTIFICATE OF SERVICE

I hereby certify that on October 10, 2003, I electronically filed the forgoing with the Clerk of Court using the CM/ECF system (with the original, executed affidavit of Mark Thompson to be filed manually and separately), which will send notification of such filing to:

Craig A. Smith, Esq.
Gamble Hartshorn Johnson, LLC
One East Livingston Avenue
Columbus, Ohio 43215
E-Mail: smith@ghjlaw.com

Attorneys for Plaintiff,
Discover Bank

s/Rodney A. Holaday
Rodney A. Holaday (0068018)
Vorys, Sater, Seymour and Pease LLP
52 East Gay Street
Columbus, OH 43215
Telephone: (614) 464-6400
Facsimile: (614) 464-6350
E-mail: raholaday@vssp.com

Attorneys for Defendant,
New Vision Financial, LLC